Office - Supreme Court, U.S.
FILED
FEB 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-330

IN THE

Supreme Court of the United States

October Term, 1981

UNITED ENGINEERS & CONSTRUCTORS INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
and RAYMOND WILLIAMS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER, UNITED ENGINEERS & CONSTRUCTORS INC.

BERNARD G. SEGAL *
MARTIN WALD
NICHOLAS N. PRICE
1719 Packard Building
Philadelphia, PA 19102
(215) 988-2222
Attorneys for United Engineers & Constructors Inc.

SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102
Of Counsel.

* Counsel of Record for Petitioner

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	ii
ARGUMENT	1
I. Assuming *Arguendo* the Correctness of the District Court's Vicarious Liability Ruling, Its Decision as to United Nevertheless Should Be Reversed	1
A. Respondents' Statement of the Case Is Inaccurate and Misleading	1
B. Respondents Err in Contending That Each Employer Was Properly Held Liable Regardless of Its Individual Work Force Statistics	3
C. The District Court Lacked Personal Jurisdiction Over the Defendant Class Members	5
D. The Certification of the Defendant Class Was Improper	8
II. Respondents' Assertion That the Employers Are Liable Under 42 U. S. C. § 1981 Is Without Merit	9
A. Neither the Statutory Language Nor the Cases Interpreting It Support Respondents' Argument That the Employers Have a "Non-Delegable Duty" Under Section 1981	10
B. Respondents Err in Contending That the Hiring Hall Was a "Joint Enterprise" or "Joint Venture"	14
C. The Employers Did Not Have a Right to Control the Union's Referral Practices	16
CONCLUSION	19
ADDENDA:	
A. Affidavit of Rogers Gimbernat	Add. 1a
B. Excerpt From Exhibit P-168	Add. 3a

TABLE OF CITATIONS

Cases:	Page
Bowles v. Carnegie-Illinois Steel Corp., 149 F. 2d 545 (7th Cir. 1945)	16
Bradford Trust Company v. Wright, 70 F. R. D. 323 (E. D. N. Y. 1976)	9
Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961)	11
Christopher v. Brusselback, 302 U. S. 500 (1938)	6, 7
Donson Stores, Inc. v. American Bakeries Co., 58 F. R. D. 485 (S. D. N. Y. 1973)	7
Eaton v. Courtaulds of North America, Inc., 578 F. 2d 87 (5th Cir. 1978)	16
Emor, Inc. v. Cyprus Mines Corp., 467 F. 2d 770 (3d Cir. 1972)	16
Flowers v. Crouch-Walker Corp., 552 F. 2d 1277 (7th Cir. 1977)	10
Furnco Construction Corp. v. Waters, 438 U. S. 567 (1978)	5, 12
Grove Laboratories v. Brewer & Co., 103 F. 2d 175 (1 Cir. 1939)	16
Industrial Equipment Co. v. Emerson Electric Co., 554 F. 2d 276 (6th Cir. 1977)	16
International Brotherhood of Teamsters v. United States, 431 U. S. 324 (1977)	4, 5, 11
Kelley v. Southern Pacific Co., 419 U. S. 318 (1974)	16
Lee v. Washington, 390 U. S. 333 (1968)	6, 8
Local 357, International Brotherhood of Teamsters v. NLRB, 365 U. S. 667 (1961)	14
Logue v. United States, 412 U. S. 521 (1973)	10, 13, 17, 18
Mackey v. National Football League, 543 F. 2d 606 (8th Cir. 1976), cert. dismissed, 434 U. S. 801 (1977)	16
Miller v. Bank of America, 600 F. 2d 211 (9th Cir. 1979)	10
NAACP v. Claiborne Hardware Co., No. 81-202	18

TABLE OF CITATIONS (Continued)

Cases (Continued): Page

NLRB v. Amax Coal Co., — U. S. —, 69 L. Ed. 2d 672 (1981) 2

People ex rel. Price v. Sheffield Farms-Slawson-Decker Co., 225 N. Y. 25, 121 N. E. 474 (1918) 11

Richardson v. Walsh Construction Co., 334 F. 2d 334 (3d Cir. 1964) 16

Smith v. Swormstedt, 57 U. S. 288 (1853) 6

Texas Department of Community Affairs v. Burdine, 450 U. S. 248 (1981) 12

United Pilots Association v. Halecki, 358 U. S. 613 (1959) .. 13

United States v. Gypsum Co., 333 U. S. 364 (1948) 17

West v. United States, 361 U. S. 118 (1959) 13

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U. S. 100 (1969) 7

Statutes:

All Writs Act:

28 U. S. C. § 1651(a) 9

Civil Rights Act of 1866:

42 U. S. C. § 1981 .....4, 9, 10, 11, 12, 13, 14

Civil Rights Act of 1871:

42 U. S. C. § 1985(3) 5

Civil Rights Act of 1964:

Title VII, 42 U. S. C. § 2000e et seq. 9, 11, 12

Federal Tort Claims Act:

28 U. S. C. § 1346(b) 13, 17

Labor Management Relations Act:

Section 302(c)(5), 29 U. S. C. § 186(c)(5) 2

National Labor Relations Act:

Section 8(f)(3), 29 U. S. C. § 158(f)(3) 14, 18

18 U. S. C. § 4002 14

18 U. S. C. § 4042 .....13, 14

TABLE OF CITATIONS (Continued)

Rules: Page

Equity Rule 38 ..... 6, 7

Federal Rules of Civil Procedure:

Rule 12(b)(2) 7

Rule 23 ..... 5, 6

Rule 23(a) 8

Rule 23(b)(1)(A) 8, 9

Rule 23(b)(1)(B) 8, 9

Rule 23(b)(2) 8

Authorities:

Executive Order 11246 ..... 2, 18

Harper & James, The Law of Torts (1956) 16

Legislative History of Titles VII and XI of Civil Rights Act of 1964 10

Restatement (2d) of Agency:

Section 214 12

United States Department of Labor, Exclusive Union Work Referral Systems in the Building Trades (1970) 15

Wright & Miller, Federal Practice & Procedure 7

ARGUMENT

I. Assuming *Arguendo* the Correctness of the District Court's Vicarious Liability Ruling, Its Decision as to United Nevertheless Should Be Reversed.

Even if the District Court correctly ruled that an employer is vicariously liable for a union's discriminatory referral practices (*but see* Part II *infra*), there remain several reasons why the District Court erred in finding the unnamed defendant class members liable and in imposing mandatory hiring quotas on them. United Engineers & Constructors Inc. (United)[1] begins its reply brief by addressing the issues peculiarly pertinent to it as an unnamed defendant class member.

A. Respondents' Statement of the Case Is Inaccurate and Misleading.

If there is any single thread running throughout all of United's arguments in this case, it is that United has a right under due process of law to be evaluated on the basis of its *own* conduct. The District Court made no findings of fact whatsoever regarding United, and Respondents[2] point to no facts in the record regarding United. Rather, they make sweeping and generalized references to "the employers," "the contractors," "the petitioners" and "the industry,"[3] which provide no basis for affirming the find-

1. United's listing of corporate affiliates is contained in footnote 1 of its principal brief.

2. As used in this brief, the term "Respondents" means all Respondents, but references to "Respondents' Brief" are only to the brief of the Individual and Class Respondents.

3. For example, Respondents state that federal construction funds were "withheld as a result of the employers' resistance to the Philadelphia Plan" (page 10, line 16), thereby incorrectly suggesting that *United* resisted that Plan. Similar generalized and misleading

ing of liability and the imposition of mandatory hiring quotas on *United*, and which merely underscore the mockery of due process that the proceedings below constituted.

Even with respect to "the employers" as a whole, Respondents' Statement of the Case is misleading and inaccurate in several respects. For example, Respondents contend that the employers were held vicariously liable for the discrimination by an entity they allegedly "created," the Joint Apprenticeship Training Committee (JATC). Respondents' brief at 12, 17. However, at no point did the District Court make such a holding. Indeed, any such holding would have been clearly improper, since as a matter of law the trustees of the JATC were not agents even of the employers who appointed them. *See* **NLRB v. Amax Coal Co.**, — U. S. —, 69 L. Ed. 2d 672, 682 (1981) ("the duty of the management-appointed trustee of an employee benefit fund under § 302(c)(5) is directly antithetical to that of an agent of the appointing party"). Moreover, there is no evidence or finding that United "created" or participated in the creation of the JATC. In fact, no one from United ever served as a trustee on, or otherwise had any representative on, the JATC. *See* Addendum A, ¶ 4(c).

Respondents also erroneously contend that the employers, as well as the associations, had a role in "nullifying" the Philadelphia Plan[4] by persuading the federal

3 (Cont'd.)

references to the "employers" appear on pages 3 (lines 17 and 20), 4 (lines 5 and 16), 5 (line 15), 6 (lines 7, 20, 29), 7 (line 15), 8 (lines 16, 23, 25), 9 (line 24), 10 (lines 16 and 35), 11 (line 14), 31 (line 30), 32 (lines 7 and 15), 33 (line 19) 47 (line 21), and 48 (lines 8 and 12) of Respondents' Brief. What may have been true with respect to other employers is of course not necessarily true with respect to United.

4. The Philadelphia Plan was a means of implementing Executive Order 11246 for the construction industry in Philadelphia. The Executive Order requires affirmative action on the part of companies having contracts with the federal government in excess of $10,000.

government to accept a voluntary "Affirmative Action Program" in its place. However, the District Court only found that the *association* defendants, and not any individual employers, participated in this conduct (PA. 32, 36),[5] yet not even the associations were held liable for such participation (PA. 168, 198). The District Court found that the associations represented only a small portion of the more than 1400 contractors in the defendant class (PA. 29), and there is no basis for tainting the more than 1100 *non*-member employers with the conduct of the associations. Moreover, Respondents overlook the fact that many employers in the defendant class never performed any federal contracts, and hence would not have been covered by the Philadelphia Plan. The District Court made no finding that United ever performed any federal contracts within the jurisdiction of Local 542 during the limitations period (1965-1978), and in fact United never did so.

Respondents' assertions that "the employers" violated the commitments of the Affirmative Action Program (Brief at 11-12) are equally misplaced. There was no finding or evidence that United violated any such commitment or that it was even covered by the Affirmative Action Program. Finally, Respondents' assertions that the hiring hall was "jointly created" by the "employers" (Brief at 18) ignores the fact that there was no finding or evidence that United "created" or participated in the creation of the hiring hall. Indeed, uncontradicted evidence shows exactly the opposite. Addendum A, ¶ 4(b).

B. Respondents Err in Contending That Each Employer Was Properly Held Liable Regardless of Its Individual Work Force Statistics.

In contending that each employer was properly held liable regardless of its individual work force statistics,

5. References cited as "PA.", followed by the page number, are references to the appendix to the Petitions for Certiorari in Nos. 81-330/31/32/33. References to the Joint Appendix are "JA.," followed by the page number.

Respondents totally ignore United's argument that the District Court made no finding that discrimination was the "standard operating procedure" in the hiring of United's work force. It is the absence of that key finding, not merely the absence of statistics, that requires reversal of the judgment with respect to United. *See* **International Brotherhood of Teamsters v. United States,** 431 U. S. 324, 336 (1977).

Respondents incorrectly suggest that United had a statistically significant underutilization of minorities, by contending that it was not one of the 23 employers whose work forces were at least 10 percent minority. Respondents' assertion merely underscores the impropriety of adjudicating the liability of employers on a defendant class basis. They ignore the fact that the jurisdiction of Local 542 was administratively broken down into five districts (PA. 29), and that the percentage of minorities in the labor forces in three of the five districts was considerably less than 10 percent. *See* Addendum B. Employers such as United which did a substantial amount of work in the rural counties understandably would have work forces that were less than 10 percent minority. Moreover, the statistics on which Respondents rely cover only the period 1969-1971. JA. 273. Since the limitations period in this lawsuit covers thirteen years (from November, 1965 to November, 1978), those statistics cover but a small fraction of the relevant time period. Finally, because United's own statistics were not introduced into evidence, there is no factual basis for determining whether its "shortfall" below 10 percent, if any, was statistically significant. Thus, there is no basis in the record for a finding that discrimination was the "standard operating procedure" in the selection of United's employees. **Teamsters,** *supra.*

Respondents next make the astonishing contention that "each employer individually violated § 1981 regardless of the racial composition of its own work force." (Brief at 34). However, if a particular employer had a racially balanced work force, that fact would clearly negate any

claim that the Union's "standard operating procedure" in making referrals to that employer was discriminatory. Respondents' attempt to pin "collective" responsibility on the employers as a class (Brief at 33) must fail, not only because it is based on factual misstatements,[6] but also because it flies in the face of the District Court's dismissal of the section 1985(3) conspiracy claim for lack of proof. PA. 196-98. There is no principle of law under which 1400 non-conspirators can be held to have "collective" responsibility for the wrongs to Respondents. If United in fact had a "non-delegable duty" to afford blacks the same right to enter into employment contracts as whites, that duty would not extend to employment contracts with *other* employers.

Respondents' reliance on **Furnco Construction Corp. v. Waters**, 438 U. S. 567 (1978), is completely misplaced. United acknowledges that a racially balanced work force is not a conclusive defense in an individual disparate treatment case such as **Furnco**. In a class action, however, this Court held in **Teamsters** that there must be a finding of class-wide discrimination in the selection of the employer's work force before class-wide prospective relief may be imposed on that employer.

C. The District Court Lacked Personal Jurisdiction Over the Defendant Class Members.

Respondents argue that neither Rule 23 nor court decisions require service of the complaint and summons on unnamed members of a defendant class. However, United does not contend that service of process on the unnamed class members is required where a defendant class action is used for its proper and limited purpose, *i.e.*, to adjudicate common questions of law and fact with possible *res judicata*

6. In support of that contention, Respondents repeat their inaccurate assertions regarding the employers' alleged involvement with the JATC and in the "nullification" of the Philadelphia Plan. *See* pages 2-3, *supra*.

consequences for the class members. What United does contend is that service of process is necessary to obtain personal jurisdiction over the defendant class members, and that personal jurisdiction must be obtained before adjudicating the employers' liability and subjecting them to a costly mandatory injunction.

None of the cases Respondents cite adjudicated personal liability of defendant class members or imposed mandatory injunctive obligations on them. Respondents' assertion that this Court in **Smith v. Swormstedt,** 57 U. S. 288 (1853), "affirmed a money judgment against a defendant class" (Brief at 60) is totally incorrect. As United noted on page 30, footnote 23 of its principal brief, **Smith v. Swormstedt** was an *in rem* proceeding involving the question whether ministers of the southern branch of the Methodist Church were entitled to their share of a fund established for Methodist preachers prior to the split of the Church into northern and southern branches. The only judgment entered in that case was one directing the named defendants, the custodians of the fund, to provide the southern ministers with their proper share of the fund. By no stretch of the imagination did this Court hold that the individual northern ministers were personally liable to the southern ministers.

Respondents' reliance on **Lee v. Washington,** 390 U. S. 333 (1968), is also misplaced. Neither the opinion of this Court, nor that of the District Court, nor the briefs filed in that case, addresses the question of personal jurisdiction over the defendant class members.[7]

---

7. Respondents' attempt to distinguish **Christopher v. Brusselback,** 302 U. S. 500 (1938), on which United had relied on pp. 30-31 of its principal brief, is without merit. Contrary to Respondents' assertions, this Court in **Christopher** did *not* reject the applicability of Equity Rule 38 (the precursor to Rule 23) on the ground that "plaintiffs had asserted the applicability of Equity Rule 38 for the first time in their Reply Brief filed in this Court." Rather, it rejected the applicability of Equity Rule 38 because the purpose of that Rule "was to prescribe the procedure in Equity to be followed in

Finally, respondents err in contending that United's "active involvement in this litigation since 1977 confers party status" on it (Brief at 68 n. 90).[8] Even if United had "party status" (which it did not have),[9] that fact would be irrelevant to the question of personal jurisdiction, since a court would lack personal jurisdiction even over a named defendant who had not been served with process. United unquestionably preserved its contention that personal jurisdiction over it was lacking.[10]

---

7. (Cont'd.)

cases within the jurisdiction of the federal courts and not to enlarge their jurisdiction." 302 U. S. at 505. While acknowledging that the federal courts had jurisdiction under Equity Rule 38 in *in rem* proceedings, *i.e.*, proceedings "to render a decree binding upon absent defendants affecting their interest in property within the jurisdiction of the court," *id.* at 505, it held that *in personam* jurisdiction over the defendants was lacking. *Id.* at 502.

8. Respondents exaggerate the extent of United's participation in this litigation. United had absolutely no involvement in any of the pre-trial proceedings (including discovery) or in the trial itself. Rather, its participation was limited to filing several *post*-trial motions and briefs dealing only with its rights and obligations as a member of the defendant class.

9. *See, e.g.*, **Donson Stores, Inc. v. American Bakeries Co.**, 58 F. R. D. 485, 489 (S. D. N. Y. 1973).

10. So long as a litigant asserts the absence of personal jurisdiction from the outset of his participation in the case, his participation thereafter does not subject him to the court's jurisdiction. As one treatise states: "A party who has unsuccessfully raised an objection under Rule 12(b)(2) may proceed to trial on the merits without waiving the challenge." 5 Wright & Miller, **Federal Practice and Procedure**, § 1351 at 568. *See also id.* at 562-63; **Zenith Radio Corp. v. Hazeltine Research, Inc.**, 395 U. S. 100, 110 (1969).

In this case, the very first motion filed by United (JA. 330), expressly asserted the lack of personal jurisdiction over it, as well as the failure of the complaint to state a claim against it. Its briefs thereafter consistently stated that it was not consenting to the District Court's jurisdiction.

D. The Certification of the Defendant Class Was Improper.

United's principal brief contended that the commonality, typicality and adequacy of representation requirements of Rule 23(a) were not met because the District Court based its class certification decision on an erroneous *per se* theory of liability. Specifically, the District Court considered the following defenses irrelevant: (1) the lack of any discrimination by United; (2) the lack of any discrimination by the Union in making referrals to United; (3) the lack of any underutilization of minorities by United; and (4) the lack of knowledge or reason to know by United of the Union's discrimination. Respondents do not dispute United's contention that the defendant class certification necessarily falls if those defenses are valid. Rather, they merely state that "a defendant cannot control a plaintiff's theory of liability." (Brief at 61). United may not be able to control Respondents' theory of liability, but this Court surely can reject it.

On the question of certification under Rule 23(b) (2), Respondents attempt to draw support from this Court's decision in **Lee v. Washington**, *supra*. However, neither the opinion of this Court in **Lee**, nor that of the District Court, nor the briefs filed with this Court in that case, contains any discussion whatsoever of the applicability of subdivision (b)(2) to a defendant class.

As an alternative to certification under Rule 23(b) (2), Respondents argue that certification of the defendant class under subdivisions (A) or (B) of Rule 23(b)(1) would have been proper. This contention is meritless.

Subdivision (A) of Rule 23 (b)(1) authorizes a defendant class action where "the prosecution of separate actions . . . against individual members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." However, any inconsistency in adjudications against individual defendant class mem-

bers would not establish incompatible standards of conduct for *Respondents,* the party opposing the defendant class. There is simply no "standard of conduct" applicable to Respondents in this case.[11]

Subdivision (B) of Rule 23(b)(1) permits a defendant class action where the prosecution of separate actions against individual members of the class would create a risk of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not party to the adjudications or substantially impair or impede their ability to protect their interests." However, an adjudication of liability with respect to Glasgow, Petitioner in No. 81-332, would in no way be dispositive of the interests of United or impair or impede United's ability to protect its own interests.

II. Respondents' Assertion That the Employers Are Liable Under 42 U. S. C. § 1981 Is Without Merit.

We now address issues which are relevant to all Petitioners.[12]

In 1964, when Congress was debating passage of Title VII of the 1964 Civil Rights Act, Senator Clark stated in response to a question from Senator Dirksen:

> If the [union] hiring hall discriminates against Negroes, and sends him [the employer] only whites, he is not guilty of discrimination—but the union hiring hall would be.

---

11. For an appropriate use of a (b)(1)(A) defendant class action, *see* **Bradford Trust Company v. Wright,** 70 F. R. D. 323 (E. D. N. Y. 1976), an *in rem* case in which the plaintiff was a trustee of a profit sharing trust and the defendant class members were claimants with vested interests in the trust. Obviously, prosecution of separate actions against individual claimants could result in inconsistent standards of conduct for the trustee in handling the claims of the defendant class members.

12. With regard to Respondents' reliance on the All Writs Act, United incorporates by reference the arguments in the reply brief of Bechtel Power Corp. in No. 81-333.

110 Cong. Rec. 7217, reprinted in **Legislative History of Titles VII and XI of the Civil Rights Act of 1964**, Vol. 1, at 3013 (emphasis added). Despite this clear expression of legislative intent in 1964, Respondents contend that when Congress enacted 42 U. S. C. § 1981 one hundred years earlier, it intended to impose vicarious liability on employers for union discrimination, even though unions as we know them were at that time virtually nonexistent. The various legal theories advanced by Respondents do not dispel the inherent illogic of their position.

A. Neither the Statutory Language Nor the Cases Interpreting It Support Respondents' Argument that the Employers Have a "Non-Delegable Duty" Under Section 1981.

The principal argument advanced by Respondents is that 42 U. S. C. § 1981 imposes on employers a "non-delegable duty" to afford minorities the same right to enter into employment contracts as is enjoyed by whites and that the employers in the case at bar violated that duty. Respondents' contention is without merit for several reasons.

First, Respondents fail to cite *any* case holding that section 1981 imposes a "non-delegable duty" not to discriminate. The only section 1981 cases they cite in support of that theory—**Miller v. Bank of America**, 600 F. 2d 211, 213 (9th Cir. 1979), and **Flowers v. Crouch-Walker Corp.**, 552 F. 2d 1277, 1282 (7th Cir. 1977) (Brief at 26 n. 33)—did not even mention the "non-delegable duty" principle, but merely held the employers liable under traditional principles of *respondeat superior* for the discriminatory conduct of their own supervisory employees. Since Respondents expressly state that their "non-delegable duty" theory does not depend on whether the employers retained a right of control over the Union (Brief at 23), and since the right of control is essential to a finding of traditional *respondeat superior* liability,[13] **Miller** and **Flowers** are of

13. **Logue v. United States**, 412 U. S. 521, 527 (1973).

no support for Respondents' "non-delegable duty" argument.[14]

Second, Respondents' assertion that section 1981 imposes a "non-delegable duty" cannot be squared with the statutory language. Section 1981 provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens, . . .

This language does not speak of duties, and it is not addressed to employers or other potential defendants. Unlike the child labor law at issue in **Sheffield Farms**,[15] and even unlike Title VII of the 1964 Civil Rights Act, section 1981 does not by its terms impose a duty to take or refrain from certain action. Rather, it speaks only of *rights*—the right of blacks to contract on the same basis as whites.

The fact that section 1981 talks in terms of rights rather than duties leads inescapably to the conclusion that

14. The cases cited by Respondents arising under other statutes are inapposite because they, too, involve *respondeat superior* liability for acts of employees. The cases cited by the Commonwealth on pages 19-20 of its brief are likewise inapposite, not only because they make no mention of the "non-delegable duty" principle, but also because they were "disparate impact" seniority cases which, since they were decided before **International Brotherhood of Teamsters v. United States**, 431 U. S. 324 (1977), have no validity today. The Commonwealth's reliance on **Burton v. Wilmington Parking Authority**, 365 U. S. 715 (1961), is also misplaced, since that case involved the discriminatory use of public property.

15. **People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.**, 225 N. Y. 25, 121 N. E. 474 (1918). This is the principal case upon which Respondents rely for their "non-delegable duty" argument. **Sheffield** is distinguishable not only because the child labor law in that case expressly imposed duties on employers, but also because the violation of the law was committed by a servant of the employer, *i.e.*, by one of its drivers.

the "non-delegable duty" principle is inapplicable to it. By granting blacks the right to contract on the same basis as whites, section 1981 imposes liability only on those who deny blacks that right. It does not impose any duty to ensure that blacks have that right.

In the case at bar, there was no finding—and there could have been no finding—that the employers denied blacks the same right to contract as whites had. The employers did not treat blacks any differently from whites. Rather, they required *all* operating engineers—*white as well as black*— to obtain referrals from the Union before entering into employment contracts with them. Only the Union was found to have denied blacks the right to contract on an equal basis as whites.

Third, as a matter of general law the "non-delegable duty" principle applies only to affirmative duties "to provide protection for or to have care used to protect others or their property." *See* Restatement (2d) of Agency, section 214.[16] 42 U. S. C. § 1981, however, does not impose an affirmative duty "to provide protection" or "to have care used to protect others." Not even Title VII imposes such affirmative duties on employers. *See, e.g.*, **Texas Department of Community Affairs v. Burdine**, 450 U. S. 248, 259 (1981); **Furnco Construction Corp. v. Waters**, 438 U. S. 567, 577-78 (1978). There is no reason why section 1981 should impose affirmative duties on employers when Title VII does not.

Fourth, as the other petitioners have demonstrated,[17] section 1981—unlike Title VII—requires proof of discrim-

16. Section 214 provides:

> A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty.

17. *See, e.g.*, briefs of Bechtel Power Corp. (Petitioner in No. 81-333), at 13-25; Glasgow, Inc. (Petitioner in No. 81-332), at 25-

inatory intent. Respondents have not even briefed the section 1981 intent question, since they believe it is not at issue in the case (Brief at 21-22). However, the intent requirement in section 1981 is wholly inconsistent with the "non-delegable duty" theory, which Respondents contend imposes liability regardless of whether the Union was the employers' "servant," "agent" or "independent contractor" (Respondents' brief at 23). Even if the intent of a servant could be imputed to a master to satisfy the intent requirement of a statute under which the master is sought to be held vicariously liable, there is no principle of law under which the intent of a *non*-servant or *non*-agent can be imputed to another. If Respondents' non-delegable duty theory in fact affords a basis of liability irrespective of whether the Union was the employers' servant or agent, Respondents cannot rely on the finding regarding the Union's intent in order to satisfy the intent requirement of section 1981.

Finally, except for the doctrine of "unseaworthiness," which this Court has admitted is "of dubious ancestry,"[18] this Court has been reluctant to impose liability under the "non-delegable duty" theory. *See* **West v. United States**, 361 U. S. 118, 122-23 (1959). *See also* **Logue v. United States**, 412 U. S. 521 (1973), in which this Court rejected an attempt to impose liability on the United States under the Federal Tort Claims Act on the theory that the Federal Bureau of Prisons had a "non-delegable duty" under 18 U. S. C. § 4042 to "provide for the safekeeping, care, and subsistence of all persons charged with . . . offenses against the United States . . ."[19]

---

17. (Cont'd.)

31; and General Building Contractors Association, Inc. (Petitioner in No. 81-280), at 12-18.

18. **United Pilots Association v. Halecki**, 358 U. S. 613, 616 (1959).

19. At issue in **Logue** was the liability of the United States for the suicide of a federal prisoner who had been placed in a county jail

B. Respondents Err in Contending That the Hiring Hall Was a "Joint Enterprise" or "Joint Venture."

Respondents next contend that the employers and associations were correctly held liable with Local 542 because the hiring hall was a "joint enterprise" or "joint venture." This contention, which is based on a theory totally different from the "agency" theory under which the case was tried, has no support in the record.

First, the District Court never made any finding that the hiring hall was a "joint enterprise" or joint venture." On the contrary, it merely held that the Union hiring hall was an "agent" of the employers. PA. 173, 191.

Second, there is no basis in law or fact for a finding that the hiring hall was a "joint enterprise" or "joint venture" between the employers and the Union. Indeed, it is misleading even to refer to the hiring hall as an entity separate and apart from the Union. The collective bar-

19. (Cont'd.)

under a contract with the federal government pursuant to 18 U. S. C. § 4002, and over whom the county authorities allegedly had negligently failed to provide surveillance. Although this Court noted that both the statute and the specific contract at issue imposed a standard of care for federal prisoners in county jails, 412 U. S. 523-24 n. 2, and although the Federal Bureau of Prisons was under a statutory duty to provide for the safekeeping, care and subsistence of all persons, the Court held that that statute did *not* impose a "non-delegable duty" on the federal government. The Court so held because the federal government was specifically authorized to contract with state and local authorities for the care of federal prisoners. 412 U. S. at 528-30 & n. 7.

Section 1981 clearly provides a less specific duty on private employers than 18 U. S. C. § 4042 provides on the federal government. Nevertheless, even assuming that the duties imposed by § 1981 were as clear as those imposed by § 4042, federal law permits the delegation of part of the hiring function to a union hiring hall just as clearly as it permits the delegation of prisoner care to state and county facilities. *See* 29 U. S. C. § 158(f)(3); **Local 357, International Brotherhood of Teamsters v. NLRB,** 365 U. S. 667 (1961).

gaining agreements make no mention of any hiring hall. Rather, they merely required the employers to request referrals *from the Union.* JA. 231, 241-42, 255-56. The evidence likewise showed that the referrals were made exclusively by the Union. *See* PA. 167, where the District Court discussed the question of the employers' liability for "the *union's* conduct in operating the hiring hall" (emphasis added), and PA. 92, where it summarized the evidence of discrimination by "*union* officials" (emphasis added).[20] Furthermore, counsel for Respondents conceded below that the out-of-work lists from which referrals were supposed to have been made (JA. 234) were in the custody of the Union (JA. 332).[21]

Assuming *arguendo* that the hiring hall existed as an entity separate and apart from the Union, it in no way could be considered a "joint enterprise" or "joint venture." Given the inherent adversarial relationship between management and labor, as exemplified by the fact that the employers agreed to the exclusive hiring hall system only after suffering a destructive ten-week strike (PA. 23), there simply was no commonality of interest. Moreover, the "joint enterprise" doctrine "is applied almost

20. In discussing the evidence of individual instances of discrimination, the District Court referred repeatedly to testimony regarding acts of discrimination by such individuals as William Ciavaglia, Joseph O'Donoghue, James Grant and William Sautter (PA. 72-92), all of whom were officers or agents of the Union. *See* P-281 (H), reprinted in the Court of Appeals appendix at A. 2967. Ciavaglia was the District I dispatcher. PA. 63 n. 22. O'Donoghue was the District I business agent. PA. 71. Grant was a hiring hall agent. PA. 73.

21. The hiring hall system in this case was consistent with that of most other exclusive referral systems. Thus, a federal study of 82 exclusive referral systems "has shown that the union is characteristically the administrator of the exclusive work referral system, and that the employer plays little, or no role in the administration of such systems." United States Department of Labor, **Exclusive Union Work Referral Systems in the Building Trades,** 33 (1970).

exclusively in automobile cases, and has usually been invoked to impute the contributory negligence of the driver to a passenger-plaintiff." 2 Harper & James, **The Law of Torts**, § 26.13, at 1414 (1956). Also, the "joint enterprise" doctrine has been much criticized and, according to a leading treatise, "should be discarded." *Id.* § 26.14, at 1419. Finally, the "joint venture" doctrine is inapplicable because there was no agreement between the Union and employers to share in profits and losses. *Id.*, at 1413; **Richardson v. Walsh Construction Co.**, 334 F. 2d 334, 336 (3d Cir. 1964).

C. The Employers Did Not Have a Right to Control the Union's Referral Practices.

Respondents contend that the District Court found as a fact that the employers had a right to control the Union, and that such finding was not clearly erroneous. However, the "clearly erroneous" standard does not apply. The District Court's finding of a right to control was based exclusively on its reading of the collective bargaining agreements. PA. 192-93 n. 61. It is well established that lower court interpretations of written documents, which as here were not based on demeanor evidence, are freely reviewable by appellate courts.[22] Moreover, a finding of fact based upon an erroneous legal standard is likewise freely reviewable on appeal. **Kelley v. Southern Pacific Co.**, 419 U. S. 318, 323 (1974). In the case at bar, the District Court completely overlooked the constraints that the National Labor Relations Act imposed upon the

22. *See, e.g.*, **Eaton v. Courtaulds of North America, Inc.**, 578 F. 2d 87, 90 (5th Cir. 1978); **Industrial Equipment Co. v. Emerson Electric Co.**, 554 F. 2d 276, 284 (6th Cir. 1977); **Mackey v. National Football League**, 543 F. 2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U. S. 801 (1977) (construction of collective bargaining agreement); **Emor, Inc. v. Cyprus Mines Corp.**, 467 F. 2d 770, 773 (3d Cir. 1972); **Bowles v. Carnegie-Illinois Steel Corp.**, 149 F. 2d 545, 546 (7th Cir. 1945); **Grove Laboratories v. Brewer & Co.**, 103 F. 2d 175 (1 Cir. 1939).

employers in exercising any right of control over the Union. *See* United's principal brief, at 9-12.[23]

In their attempt to buttress their claim that a right to control existed, Respondents point to the existence of the non-discrimination provision in the collective bargaining agreement, which they contend gave the employers a right to control. However, this Court rejected a very similar argument in **Logue v. United States**, *supra*. Although the county in that case undertook to provide custody of federal prisoners in accordance with federal regulations specifying "standards of treatment for federal prisoners," 412 U. S. at 530, this Court held that the federal government could not be liable for the negligence of a county employee under the Federal Tort Claims Act (which adopted the common-law standard for vicarious liability, *id.* at 526), because the federal government did not retain the right to control "the detailed physical performance of the contractor." *Id.* at 528. The Court noted that the arrangement between the federal and state authorities "rather clearly contemplated that the day-to-day operations of the contractor's facilities were to be in the hands of the contractor." *Id.* at 529.

It is therefore clear that the mere existence of standards to which one party to a contract must comply and of the right to enforce those standards does not make the first party the "agent" of the other for purposes of *respondeat superior* liability.[24] If the existence of stand-

23. Even if the "clearly erroneous" standard should apply, the finding of a right to control can be set aside if this Court should reach "the definite and firm conviction that a mistake has been committed." **United States v. Gypsum Co.**, 333 U. S. 364, 395 (1948). The District Court's finding of a right of control was clearly mistaken.

24. Other factors on which Respondents rely likewise fail to create a right of control. The ability of the employers to try to persuade the Union "through informal or formal methods," to file grievances or to seek arbitration were "remedies" at least equally available to Respondents as to the employers.

ards and a right to enforce them were sufficient, the traditional distinction between "independent contractor" and "servant" would be obliterated. Moreover, if Respondents' position were taken to its logical conclusion, the federal government itself, which under Executive Order 11246 requires non-discrimination clauses in countless federal contracts, could be held vicariously liable for the discrimination by *its* contractors.

Respondeat superior liability depends on whether the alleged principal has the authority "to control the physical conduct" of the alleged agent, **Logue**, *supra*, 412 U. S. at 527, and that question in turn depends upon the totality of the circumstances. In the case at bar, as United noted on pages 9-12 of its principal brief, the employers were deprived by the National Labor Relations Act of the principal and most obvious means of exercising control over the Union—the right to supervise closely and to terminate the relationship at will. Moreover, the collective bargaining agreements clearly contemplated that referrals were to be made by the Union without any day-to-day supervision by the employers—much as the federal prison authorities had no day-to-day supervision over the county authorities in **Logue**, *supra*. Finally, the exclusive referral system was thrust upon the employers against their wishes as a result of two lengthy strikes. PA. 23; JA. 306-10.[25] A true agency relationship clearly was lacking. *See also* pages 11-19 of the brief of the AFL-CIO, *amicus curiae* in **NAACP v. Claiborne Hardware Co.**, No. 81-202.

---

25. Respondents are incorrect when they suggest that Petitioners' opposition to the exclusive referral system is inconsistent with their argument that the decisions below undermine the utility of union hiring halls (Brief at 48-49). The employers have not opposed all union hiring halls; rather, their objection was to the *exclusive* referral system which deprived them of the ability to protect themselves by hiring from other sources. The decisions below threaten the utility of *all* union referral systems, since the District Court's vicarious liability finding is not limited to exclusive systems.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in United's principal brief and in the briefs submitted by the other Petitioners, United respectfully requests this Court to reverse the judgment of the Court of Appeals and to remand the case with instructions to dismiss with prejudice the case against United.[26]

Respectfully submitted,

BERNARD G. SEGAL
MARTIN WALD
NICHOLAS N. PRICE
Attorneys for United Engineers & Constructors, Inc.

SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102
Of Counsel.

---

26. Local 542 contends that entry of judgment in favor of United would be inappropriate because the record contains evidence suggesting "that many of the contractors actively participated in the acts found by the district court to have been discriminatory" (Local 542 brief at 11). Leaving aside Local 542's questionable standing to make such a contention, the facts remain that the trial was bifurcated into separate liability and damages phases (JA. 132), that the liability phase of the trial has long been concluded, and that the plaintiffs below (as well as Local 542) failed to introduce any evidence that would support a finding that *United* "actively participated" in discriminatory acts. Indeed, Local 542's brief points to no evidence of such discrimination by United. It clearly would be inappropriate to permit Respondents or Local 542 on remand to introduce new evidence which they never attempted to introduce at trial in order to support a "direct" liability theory wholly at odds from the "vicarious" liability theory pursued at trial.

ADDENDUM A

(Affidavit of Rogers W. Gimbernat, attached as Exhibit "B" to United Engineers' Motion to Dismiss filed in the District Court as Docket #687)

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } ss

AFFIDAVIT

I, Rogers W. Gimbernat, being duly sworn according to law, do hereby depose and say as follows:

1. From July, 1972, to the present, I have held the position of Manager of Labor Relations of United Engineers & Constructors Inc., (hereinafter, the "Company"). In that position, I have had full knowledge of the Company's labor relations.

2. From 1952 to July of 1972, I held various positions in the Company, including the position of Field Superintendent.

3. Because of my duties as Manager of Labor Relations, I have personal knowledge of the Company's general labor relations and hiring practices and have personal knowledge of the Company's labor relations and hiring practices with regard to operating engineers who are members of or who are referred by Local Union No. 542, International Union of Operating Engineers. For the period prior to July of 1972, my knowledge of such hiring hall practices, and of the Company's role concerning the negotiation of collective bargaining agreements with Local 542, is based on my review of Company records.

4. On the basis of my personal knowledge and on my review of Company records, I depose and say as follows:

(a) The Company was not a "C" Branch contractor, did not execute any "C" Branch collective

bargaining agreements and did not hire through the "C" Branch of Local 542.

(b) No one from the Company ever had any role in negotiations regarding the hiring hall provision in collective bargaining agreements with Local 542.

(c) No one from the Company has ever served as a trustee on, or otherwise had any representative on, the Joint Apprenticeship Training Committee.

The foregoing is true and correct to the best of my knowledge, information and belief.

/s/ R. W. GIMBERNAT
Rogers W. Gimbernat

Sworn to and subscribed
before me this 3rd day
of November, 1977.

/s/ IRENE FITZPATRICK
Notary Public

My Commission Expires January 31, 1981

ADDENDUM B

(Trial Exhibit P-168, Report No. 1, excerpt from page 7)

TABLE 2

RACIAL DISPARITY BY DISTRICT

	Membership		*Community*	
District	*Percent Black*	*Percent Minorities*	*Percent Black*	*Percent Minorities*
1	6.4	7.2	17.3	18.0
2	0.3	0.6	1.1	1.3
3	0.1	0.1	0.6	0.7
4	0.9	1.1	2.6	2.8
5	2.6	3.5	12.4	12.1